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Mandatory human rights due diligence legislation

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Abstract: Since the adoption of the United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles) in 2011, several states have adopted domestic laws aiming at implementing human rights due diligence (see Human Rights Due Diligence), at least in part. This Teaching Note surveys categories of domestic legislation that address human rights due diligence, highlight recent examples of domestic legislation mandating human rights due diligence, and outlines approaches for teaching the topic.

Posted at the Zurich Open Repository and Archive, University of Zurich
ZORA URL: <https://doi.org/10.5167/uzh-183142>
Scientific Publication in Electronic Form
Accepted Version

Originally published at:

Bueno, Nicolas (2019). Mandatory human rights due diligence legislation. New York: The Teaching Forum.

Mandatory Human Rights Due Diligence Legislation

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Overview

Since the adoption of the United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles) in 2011, several states have adopted domestic laws aiming at implementing human rights due diligence (see Human Rights Due Diligence), at least in part. This Teaching Note surveys categories of domestic legislation that address human rights due diligence, highlight recent examples of domestic legislation mandating human rights due diligence, and outlines approaches for teaching the topic.

Some of these laws only address specific human rights issues or risks, such as modern slavery or the use of conflict minerals. More generally, mandatory human rights due diligence laws can be distinguished according to their purpose and divided into three categories:

- 1) mandatory disclosure laws (see Mandatory Human Rights Reporting)¹
- 2) mandatory due diligence laws strictly defined, and
- 3) human rights due diligence and liability laws.

Mandatory Disclosure Laws

Several domestic laws require companies to disclose information regarding human rights, such as the *California Transparency in Supply Chains Act 2010*, *Section 1502 of the Dodd-Frank Act*, the *U.K. Modern Slavery Act*, the *European Union Directive 2014/95 on Disclosure of Non-Financial Information* and the recently adopted *Australian Modern Slavery Bill*.² The

purpose of these laws is limited to require disclosure from corporation about specific risks. Sanctions are sometimes in place to ensure this goal.³

Mandatory Due Diligence Laws (strictly defined)

In addition to disclosure requirements, several laws also require corporations to comply with a human rights due diligence standard of conduct defined in the law itself. These laws describe the conduct that companies must adopt under certain circumstances. Most mandatory due diligence laws include specific sanctions for failure to comply. Yet, mandatory due diligence laws as defined in this category do not aim at guaranteeing access to remedy for affected people or compensating their harm. They must be distinguished from the third category presented below.

For example, the Final Rule for implementation of Section 1502 of the Dodd-Frank Act does specify the standard for due diligence that must be exercised once a company has determined that it uses conflict minerals. Accordingly, companies must follow a nationally or internationally recognized due diligence framework, such as the OECD's *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*.⁴ However, the law does not entail a specific sanction for not complying with the expected corporate conduct.

European Regulation 2017/821 also lays down specific supply chain due diligence obligations for importers of certain conflict minerals.⁵ Importers subject to the regulation must comply with obligations set in Articles 4 to 7. In addition to disclosure requirements, Articles 4 to 7 set obligations regarding management system, risk management and third party audit. As regard to sanctions, each European member state shall designate a competent authority responsible for carrying ex-post checks as defined in Article 11. However, no remediation mechanism is in place for affected people.

A third example of mandatory due diligence law, as narrowly defined in this note, is the currently discussed *Dutch Child Labour Due Diligence Bill*.⁶ In 2017, the lower house of the Dutch Parliament presented a law requiring companies to disclose information and assess whether goods and services have been produced with child labour pursuing to the International Child Labour Guidance for Business. If there is a reasonable presumption that child labour has been used, the corporation is requested to draw up an action plan in line with the UN Guiding

Principles and to implement it. Administrative and criminal sanctions are in place to ensure disclosure and the adoption as well as implementation of an action plan when required.⁷ Yet the law itself does not entail a specific corporate civil or criminal liability provision for the use of child labour itself. The Bill has been adopted by the Senate and should enter into force in 2022.

Human Rights Due Diligence and Liability Laws

In addition to mandatory disclosure and due diligence laws, the third category of laws discussed in this note contain corporate liability provisions. Corporate liability laws for human rights abuses define the conditions upon which a corporation may be held civilly or criminally liable for a damage when it fails to conduct human rights due diligence. This Note focuses on civil liability provisions. In common law countries, parent liability or liability in the supply chain for human rights abuses is currently discussed by domestic courts around the concept of duty of care. As a result of uncertainty about parent liability and the liability of contracting companies for human rights-related damage in case-law,⁸ Switzerland and Germany are discussing how to clarify the link between the lack of due diligence and corporate liability. France has adopted such law.

In France, la *loi relative au devoir de vigilance* entails a human rights due diligence obligation for companies over a certain size.⁹ Due diligence applies with regard to the company's operations, operations of the companies it controls and operations of subcontractors or suppliers with whom it maintains an established commercial relationship. The law expressly establishes a fault liability for the company's own actions and omissions on the basis of the general tort of negligence. Accordingly, a company that fails to comply with its due diligence duty shall be liable and obliged to compensate for the harm that due diligence would have permitted to avoid.¹⁰ In contrast to mandatory due diligence laws presented above, the French law offers a remediation mechanism for affected people in form of a compensation.

The second example is the Swiss Responsible Business Initiative,¹¹ which aims to add a new article on responsible business conduct in the Swiss Constitution. According to the text of the constitutional initiative companies are required to carry out appropriate due diligence. Additionally, corporations shall be liable for the harm caused by controlled companies.¹² In order to avoid a popular vote, the Swiss Parliament is currently discussing the adoption of a counter-project at the legislative level.¹³ The counter-proposal, which is still pending, includes

a due diligence obligation for companies over a certain size and a specific liability provision for parent liability. Accordingly, parent companies that must comply with their due diligence obligation are liable for the damage caused by a controlled company unless they can prove that they exercised the required due diligence or could not influence the controlled company.¹⁴

Finally, in its coalition agreement on implementing the National Action Plan on Business and Human Rights, the German government has committed itself to legislative measures if by 2020 fewer than 50 percent of German companies with more than 500 employees have introduced an effective human rights due diligence process. An official legislative proposal has not yet been released.¹⁵

Chart I lists domestic laws aiming at implementing human rights due diligence in chronological order. It compares them in light of their purpose.

Chart I: Categories of “Business and human rights laws” in chronological order¹⁶

Title (chronological order)	Disclosure provision	Due diligence provision	Liability provision (criminal/civil)	
California Transparency in Supply Chains Act 2010 (US)	X			
Dodd–Frank Act, sec 1502, 2010 (US)	X	X		
Federal Act on Private Security Services Provided Abroad 2013 (CH)		X	X	
Directive 2014/95 on Disclosure of Non-Financial Information 2014 (EU)	X			
Modern Slavery Act 2015 (UK)	X			
Loi relative au devoir de vigilance 2017 (FR)	X	X		X
Regulation 2017/821 on Supply Chain Due Diligence Obligations for Importers of [Minerals] from Conflict-Affected and High-Risk Areas 2017 (EU)	X	X		
Modern Slavery Bill, in discussion 2018 (AU)	X			
Child Labour Due Diligence Proposal, currently in discussion (NL)	X	X		
Popular Initiative on Responsible Business and Parliamentary Counter-Proposal, currently in discussion (CH)	X	X		X

Teaching Approaches

There are different teaching approaches to present domestic legislation aiming at implementing the UN Guiding Principles. One possible approach is to compare legislation in different countries with regard to their purpose. As presented in this note, business and human rights legislation may be divided in categories, such as mandatory disclosure laws, mandatory due diligence laws and laws establishing remediation mechanism for affected people through corporate liability.

Using such categories offers a practical way to discuss sometimes complex domestic laws for policy and business students without analyzing legal constructions in detail. **Policy students** may for example focus on the practical and political context for differences in scope of the legislation or why some countries are passing laws while other do not. **Business students** may analyze more carefully the practical and expected impact of each kind of legislation on business conduct.

Instructors in **law** may wish to present legislation into more detail. Presenting the text of the laws requires more time but ensures an exact comprehension of the texts. For example, some mandatory disclosure laws require a report while in others the company must only provide a clear and reasoned explanation for not doing so. The scope of due diligence duties varies considerably from one law to another. Instructors in law as well as in business ethics can use practical examples to discuss the extent to which due diligence would apply in a practical case. This helps students to understand the conduct that is expected from a company with regard to its own operations within a corporate group and in its supply chain. Finally, instructors in law, in particular in tort law, can compare corporate liability mechanisms distinguishing different types of liability, such direct fault liability or the liability for the damage caused by a controlled company.

Learning objectives for students in courses that present business and human rights legislation may include:

- Being aware of discussions about implementing corporate human rights due diligence as established in the UN Guiding Principles through domestic legislation
- Understanding the scope of domestic laws aiming at implementing human rights due diligence

- Assessing the extent to which such laws reflect the due diligence standard set in UN Guiding Principles
- Understanding and assessing differences between domestic laws on business and human rights

Key Questions

General

- Which domestic laws on business and human rights have been adopted or are in discussion?
- What are their purpose and scope?
- What are the differences between mandatory disclosure laws, mandatory due diligence laws and corporate human rights liability laws?
- To what extent does domestic legislation reflect the UN Guiding Principles?

For law students

- What are the legal sanctions contained in mandatory disclosure laws and mandatory due diligence laws?
- How is due diligence defined in mandatory due diligence laws?
- What types of corporate liability are in place or discussed in regard to human rights abuses?
- What are the conditions for establishing corporate liability for a human rights-related harm in domestic legislation?
- If you were drafting mandatory human rights due diligence legislation, what provisions would you include? Which existing laws would you use as a model?

For business students

- What conduct is expected from a company in mandatory disclosure laws, mandatory due diligence laws and corporate liability laws?
- What category of laws may have the greatest impact on business conduct and why?
- How is “due diligence” defined in mandatory due diligence laws and corporate liability laws and what does it mean in practice for the corporation?

- What organizational measures must a company adopt with regard to subsidiaries and suppliers according to these different laws? Are they precise enough for corporations?

For policy students

- Why do some countries regulate the conduct of their multinational enterprises and others do not?
- How do these laws reinforce or undermine the international non-binding standards set by the UN Guiding Principles?
- How does the adoption of such laws in one country affect policy in other countries?
- What are the advantages and disadvantages of adopting laws covering specific issues and risks only, such as modern slavery or the use of conflict minerals?

References

Primary Sources

Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, official text in French, available at <http://www.assemblee-nationale.fr/14/ta/ta0924.asp>

French Corporate Duty of Vigilance Law, unofficial English translation by European Coalition for Corporate Justice, available at <http://corporatejustice.org/documents/publications/ngo-translation-french-corporate-duty-of-vigilance-law.pdf>

Initiative populaire fédérale 'Entreprises responsables – pour protéger l'être humain et l'environnement' official text in French, German, and Italian, available at www.bk.admin.ch/ch/f/pore/vi/vis462t.html

Swiss Responsible Business Initiative, unofficial English translation by Swiss Coalition for Corporate Justice, available at <https://corporatejustice.ch/about-the-initiative/>

Dutch Child Labour Due Diligence Law, official text in Dutch, available at https://www.eerstekamer.nl/behandeling/20170207/gewijzigd_voorstel_van_wet/document3/f=/vkbkk8pud2zt.pdf

Commentaries

Stéphane Brabant and Elsa Savourey, France's Corporate Duty of Vigilance Law, A Closer Look at the Penalties Faced by Companies, *Revue internationale de la compliance et de l'éthique des affaires*, 14 December 2017.

Article discussing conditions under which a company may be held civilly liable under the French Corporate Duty of Vigilance Law.

Nicolas Bueno, The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability, in Liesbeth Enneking (ed.), *Accountability, International Business Operations, and the Law* (Routledge 2020) 239-258.

Article presenting the political and legal background of the Swiss Popular Initiative on Responsible Business and comparing it to other mandatory due diligence mechanisms and in particular the French Corporate Duty of Vigilance Law.

Nicolas Bueno, Multinational Enterprises and Labour Rights: Concepts and Implementation, in J. Bellace and B. ter Haar (eds.) Research Handbook on Labour, Business and Human Rights Law (Edward Elgar 2019) 421-438, available at <https://doi.org/10.4337/9781786433114.00037>
Article defining the concept of 'labour rights due diligence' and comparing mandatory due diligence legislation with a focus on labor rights.

Sandra Cossart, Jérôme Chaplier, and Tiphaine Beau de Lomenie, The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All, *Business and Human Rights Journal* (Vol. 2, 2017) 317.

Overview of the scope and content of the French Corporate Duty of Vigilance Law including requirements for how to establish of a vigilance plan and conditions of legal liability for companies subject to the law.

Stéphane Brabant, Charlotte Michon and Elsa Savourey, The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance, *Revue internationale de la compliance et de l'éthique des affaires*, 14 December 2017, Article no 93.

Overview of the steps that companies are required to take within their obligations to establish, communicate and effectively implement a vigilance plan under the French Corporate Duty of Vigilance Law.

Reports

European Parliament, Access to legal remedies for victims of corporate human rights abuses in third countries, February 2019, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf)

Overview of legal and procedural hurdles for accessing legal remedies for victims of corporate human rights abuses. Comparison of mandatory due diligence legislation in different countries and their role in improving access to legal remedies.

Center for Human Rights Studies, Access to Remedy: Study commissioned by the Swiss government, September 2017, available at https://www.menschenrechte.uzh.ch/dam/jcr:3367e6f4-4f05-4e2e-8545-fbb327c9ac3f/180919_Access_to_Remedy.pdf

Overview of legal and procedural hurdles for accessing legal remedies for victims of corporate human rights abuses. Comparison of mandatory due diligence legislation in different countries and their role in improving access to legal remedies.

Charts and Maps on Mandatory Due Diligence Legislation

Business and Human Rights Resource Center, National Movements for Mandatory Human Rights Due Diligence in European Countries, available at <https://www.business-humanrights.org/en/national-movements-for-mandatory-human-rights-due-diligence-in-european-countries>

Business and Human Rights in Law, Key Developments, available at <http://www.bhrinlaw.org/key-developments>

¹ Erika George, “Teaching Note: Mandatory Human Rights Reporting,” in *Teaching Business and Human Rights Handbook* (online, 2016),

<https://teachbhr.org/resources/teaching-bhr-handbook/teaching-notes/mandatory-human-rights-reporting/>.

² Ibid.

³ See e.g., Australia, “Australian Modern Slavery Bill 2018”, Sec 16,

<https://www.legislation.gov.au/Details/C2018A00153>

⁴ Securities and Exchange Commission, Sec 1502 Final Rule, at 205. See Olga Martin-Ortega, “Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?” *Netherlands Quarterly of Human Rights* 32 (2014): 66.

⁵ EU Regulation 2017/821 of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum, and tungsten; their ores; and gold originating from conflict-affected and high-risk areas [2017], <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R0821>

⁶ Netherlands, “Child Labour Due Diligence Law” ,

www.eerstekamer.nl/wetsvoorstel/34506_initiatiefvoorstel_kuiken

⁷ See Christine Kaufmann, “Menschen-und umweltrechtliche Sorgfaltsprüfung im internationalen Vergleich” *Pratique Juridique Actuelle* (2017): 974.

⁸ See Nicolas Bueno, “Multinational Enterprises and Labour Rights: Concepts and Implementation” in *Labour, Business and Human Rights Law*, ed. Janice Bellace and Beryl ter Haar (Edward Elgar 2019).

⁹ France, Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre, 2017,

<http://www.assemblee-nationale.fr/14/ta/ta0924.asp>.

¹⁰ Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Lomenie, “The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All” *Business and Human Rights Journal* 2 (2017) 317.

¹¹ Switzerland, “Popular Federal Initiative on Responsible Business”, unofficial English translation <http://konzern-initiative.ch/initiativtext/?lang=en>.

¹² Nicolas Bueno, “The Swiss Popular Initiative on Responsible Business: from Responsibility to Liability,” in *Corporate Responsibility, Human Rights and the Law*, ed. Liesbeth Ennking et al. (London: Routledge).

¹³ Switzerland, “Indirect Counter-Proposal to the Popular Federal Initiative on Responsible Business,” June 2018, unofficial English translation, http://www.bhrinlaw.org/180508-swiss-parliament-counter-proposal_unofficial_en-translation_updated.pdf.

¹⁴ Nicolas Bueno, “The Swiss Responsible Business Initiative and its Counter-Proposal: Texts and Current Developments,” *Business and Human Rights Journal Blog*, December 2018, <http://coreblog.cambridge.org/2018/12/07/the-swiss-responsible-business-initiative-and-its-counter-proposal-texts-and-current-developments/>

¹⁵ Saskia Wilks and Johannes Blankenbach, “Will Germany become a leader in the drive for corporate due diligence on human rights?,” *Business and Human Rights Resource Centre* February 2019, <https://www.business-humanrights.org/en/will-germany-become-a-leader-in-the-drive-for-corporate-due-diligence-on-human-rights>.

¹⁶ Updated chart from Nicolas Bueno, *supra* notes 8 and 12.